Supreme Court, U.S.
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No. 97-1430

In The

Supreme Court of the United States

October Term, 1997

SCANDINAVIAN HEALTH SPA, INC.,

Petitioner,

vs.

ANDREA FRANKLIN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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COMPENSATING RESPONDENT'S COUNSEL FOR THE UNSUCCESSFUL CONSTRUCTIVE DISCHARGE CLAIM EXEMPLIFIES A RECURRING PROBLEM THAT VIOLATES BOTH THE SPIRIT AND THE LETTER OF TITLE VII.

Respondent's Brief in Opposition highlights the critical reason why the Court should grant review: Respondent's counsel pursued a groundless constructive discharge claim, to Respondent's eventual detriment, because they were worried about how much they would be paid, converted this case into a lawsuit over attorney fees, and now want to be compensated for their wasteful efforts. These problems are recurring; examples are increasing; and the problem remains even after the Civil Rights Act of 1991 was enacted.

The District Court's conclusion that the demotion and constructive discharge claims involved intertwined and overlapping facts[1] does not insulate Respondent's counsel from a reduced fee award. Under *Hensley v. Eckerhart*, 461 U.S. 424 (1983),

> [w]here a lawsuit consists of related claims . . . where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

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1. Respondent misleads the Court when it asserts that Scandinavian waived any challenges when it stated before the Eleventh Circuit that "the district court correctly noted that the operative facts relevant to Franklin's claims were intertwined and overlapping." What Respondent did not inform the Court was that the next sentence was, "The district court erroneously stopped its analysis at that point, summarily stating that an award of attorney fees was justified because of the existence of a central core of facts." (Appellate Brief at 49).

Id. at 439. Based upon Respondent's very limited success, the full fees awarded by the District is prohibited by *Hensley*.

The constructive discharge claim was an unqualified failure.[2] Respondent received a small monetary award, which was a fraction of what she demanded at trial, precisely because she lost her constructive discharge claim. Had she prevailed on that claim, she could have received nearly $150,000. Respondent conveniently neglects to mention that she likewise demanded, but failed to receive, injunctive relief, reinstatement, and/or front pay because she lost her discharge claim. The District Court's findings underscore the groundlessness of the discharge claim.[3]

Logic dictates that this strategy was pursued for two possible reasons: Either Respondent was trying to "piggyback" a short-term sexual harassment claim with limited damages onto a discharge claim with exponentially greater monetary potential, or Respondent's legal counsel was trying to justify their vast expenditure of time on such a small claim. The first endeavor failed, and the second should meet the same end.

It is the fractional monetary award and the absence of any nonmonetary relief that mandates a reduced fee for limited

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2. Respondent's efforts either to characterize her discharge claim or explain why she failed, while completely false, are beside the point. Respondent failed on that claim, and her recovery was reduced drastically as a consequence.

3. The District Court dismissed this claim because: (1) there was absolutely no evidence of sexual harassment following Respondent's demotion; (2) Respondent's fear that the sexual harassment would recur was unfounded; and (3) Respondent actually resigned voluntarily, despite being urged to stay, to take a better paying job following a company-wide compensation reduction that prompted many others to leave. *Liability Decision* at 37-38.

success. The reduction is based not upon, as Respondent contends, on a mere monetary comparison, but instead on the disproportion between a fee award and a judgment that includes no injunctive relief and a tiny monetary award. As *Hensley* and *Farrar v. Hobby*, 506 U.S. 103 (1992) mandate, a plaintiff that receives a fraction of an excessive demand is not entitled to a full attorney fee award.

That the 1991 Act provides greater monetary relief does not avoid the recurring situations that: (1) a plaintiff will receive a fraction of what was demanded, and yet the attorneys will be paid as if a complete victory occurred; or (2) relatively small claims will not be settled because plaintiffs' counsel will continue to pursue "long-shot" claims with much larger monetary potential with the comfort that their fees will be paid in full even if they lose those "long-shot" claims.

Respondent's predictable, albeit completely false,[4] accusation that Scandinavian unnecessarily complicated the lawsuit by conducting a "scorched-earth" strategy, is irrelevant to the central issue of this dispute. As Scandinavian indicated before, nearly two-thirds of the time spent by Respondent's counsel occurred after the $24,000 offer was rejected in January 1994. Respondent's attorney fees to that point totaled $63,772.50 (and all but two depositions had been taken to that point). The remaining $100,000 subsequently was spent on

4. All thirteen witnesses deposed by Scandinavian's counsel were identified by Respondent either in her interrogatory responses or in her deposition, and they subsequently were listed by Respondent as trial witnesses. Ironically, Respondent called only six of those persons as trial witnesses. Thus, it was Respondent's counsel who made the case unnecessarily complicated by identifying, and forcing, Scandinavian to depose useless witnesses. Moreover, Respondent insisted throughout that Bally Manufacturing also was her employer, which, according to the District Court, was not supported by any evidence.

trial preparation, trial, and post-trial briefing that was avoidable if the offer had been accepted.

Finally, this case could have settled with a greater benefit to Respondent, and at a far less cost to the courts and Scandinavian's legal counsel, if Respondent's legal counsel had not rejected a settlement offer solely because they were not receiving enough money. In fact, the only accurate statement found in Respondent's Brief in Opposition is why Respondent's legal counsel rejected the settlement offers, and it underscores why the Court must accept this case. Respondent's counsel would have forced their client to turn over the entire settlement to them and then be responsible for paying the difference. (*See* Brief in Opposition, at 8-9). The fact that Respondent's counsel admittedly placed their interests ahead of their client, and needlessly litigate the lawsuit because they were not receiving enough out of the deal, exemplifies perfectly the abuses that have occurred recently under the attorney fees statutes. If Respondent's counsel truly were concerned about their client's best interests, they could have: (1) accepted the standard one-third contingency, which would have left their client with nearly as much, if not more (depending upon which settlement offer was accepted) than the final judgment; or (2) counteroffered to leave attorney fees an open issue and move for their fees as a prevailing party. They did neither, instead using the leverage of attorneys fees to reject settlement offers worth more than their only viable claim. Consequently, their client and Scandinavian have suffered, while only they stand to be rewarded.

It is precisely these tactics of Respondent's counsel that must be stopped. These tactics will remain an obstacle to reasoned settlements even in the aftermath of the Civil Rights Act of 1991 unless this Court does something about it.

CONCLUSION

For these reasons, as well as those set forth in the Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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